APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA

No. 143-A Misc. Docket No. 16

(No. 1155, 1156, October Term, 1967)

HARRY S. BERBERIAN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR ALLOWANCE OF APPEAL

PER CURIAM — Filed: July 18, 1968

Petition Denied

APPENDIX "B"

IN THE SUPERIOR COURT OF PENNSYLVANIA

Nos. 1155, 1156, October Term, 1967

HARRY S. BERBERIAN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA

Appeal from the Judgment of Sentence of the Quarter Sessions Court of Lancaster County at Nos. 109, 110 December Sessions, 1965.

PER CURIAM — Filed: February 13, 1968

Judgment of sentence affirmed, and the defendant is directed to appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with the sentence, or any part thereof which had not been performed at the time the appeal was made a supersedeas.

APPENDIX "C"

IN THE COURT OF QUARTER SESSIONS OF LANCASTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

HARRY S. BERBERIAN

March Term, 1966, No. 66 Accessory before the fact

March Term, 1966, No. 64 Conspiracy

Motions in Arrest of Judgment and for a New Trial

OPINION

JOHNSTONE, J.

The defendant was indicted and tried on two indictments charging conspiracy, and one indictment charging accessory before the fact. At the close of the Commonwealth's testimony the defendant demurred to the indictment charging conspiracy to March Term, 1966, No. 65 and the court sustained the demurrer. Demurrers to the other two indictments were overruled, and the defendant was found guilty on both indictments by the jury.

Following the guilty verdict, the defendant filed a motion in arrest of judgment and a motion for a new trial. These motions have been argued before the court sitting en banc.

In Commonwealth v. Donatelli, 202 Pa. Superior Ct. 565 at page 568 the court stated, "In considering a motion in arrest of judgment, the court must ignore the evidence of the defendant and his witnesses which the jury had the privilege of rejecting, and must accept as correct all the evidence which supports the verdict, whether offered by the Commonwealth or the defendant, and must draw from

the evidence such reasonable inferences as will support the verdict."

In determining whether the evidence was sufficient to sustain the verdict of guilty on the charge of conspiracy, we will be guided by the statement of the Supreme Court in Commonwealth v. Yobbagy, 410 Pa. 172, at page 176, "Evidence to sustain a charge of conspiracy must be such as reasonably and naturally justifies an inference of guilt of the accused and is of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt. A conviction will not be allowed to stand if it is based solely upon suspicions and conjectures."

While the testimony in this case may not amount to an explicit or formal agreement to commit the offense of abortion, it comes as close to that as can ever be expected in a case of this kind. The victim, Elaine Ressler, testified that she went to the defendant's office on the first occasion with her sister and explained to the defendant that she was pregnant and because she already had three children she did not want a fourth one. The defendant, an osteopathic physician, told her that he could not help her, but that he knew of someone who could, and the cost would be $400.00. Mrs. Ressler returned to the defendant's office in two or three week's time and told him that she wanted to go through with the abortion. She paid the defendant $200.00 and was told by him that she would need the other $200.00 when she got to the abortionist's home in Philadelphia.

The defendant told Mrs. Ressler that he would make the necessary arrangements in Philadelphia. On her third visit to the doctor's office Mrs. Ressler was told by the defendant that he had made the arrangements, and that she was to go to Philadelphia by train on December 15th; he supplied her with the telephone number she was to call on her arrival in Philadelphia; and told her what she was to say when someone answered the telephone. These instruc-

tions were written by Mrs. Ressler on paper furnished her by the defendant, and these written instructions were produced in court. When she arrived in Philadelphia she called the telephone number given her by the defendant and told the person who answered that she was "Tonsils", as directed by the defendant.

Helen Harris testified that Mrs. Ressler came to her home in a pregnant condition, paid her $200.00, and an instrument was used on Mrs. Ressler to induce an abortion. She further testified that the defendant had called her and made the arrangements to have Mrs. Ressler come to her home for the purpose of an abortion.

The sister of Mrs. Ressler testified that she was in the defendant's office on the first visit and heard the doctor tell her sister that he could do nothing for her pregnancy, but could send her to someone who could help her. The cost was to be $400.00, of which the defendant was to receive $200.00. Mrs. Ressler was instructed to return to the doctor's office after she had thought over the situation.

In our opinion the foregoing summary of the testimony clearly indicates a combination between the defendant and Helen Harris to commit an unlawful act. The defendant received one-half of the consideration involved, and specifically made an arrangement with Helen Harris to receive Mrs. Ressler at a specific time for the purpose of committing an abortion. Helen Harris testified that the defendant called her and made an arrangement with her to have Mrs. Ressler come to her home for the specific purpose of having an abortion performed. This, in our judgment, is sufficient upon which to support a verdict of guilty of conspiracy. We see no merit in the defendant's argument that he merely sold information to Mrs. Ressler about a well known abortionist for the sum of $200.00.

The court charged the jury that "an accessory before the fact is one who plans, cooperates, assists, aids, counsels or abets in the perpetration of a felony, but who is absent when the crime itself is committed". There is no doubt from the record before us that an abortion w[illegible]

committed on Mrs. Ressler and that the defendant was not present at the time of its commission. The court later charged "Your second problem is to determine whether or not from the testimony you heard, the Commonwealth has established beyond a reasonable doubt that this defendant did something in the way of abetting, or aiding, or procuring, or counseling in the perpetration of a felony, an abortion."

The defendant takes exception to the use of the word "procuring" by the court in its charge, and claims that because of the weakness in the Commonwealth's case, the court altered the definition of an accessory before the fact to fit the facts in this case. The word "procure", according to Webster's New International Dictionary 2d ed. is defined as, "to contrive; to effect; to cause; to induce; and to solicit." The word "plan", also according to the same dictionary, is defined as "to scheme; to contrive". The usual words used to describe an accessory before the fact all have different shades of the same meaning and the word "procure" is synonymous with these words.

In Com. v. Bitler, 133 Pa. Superior Ct. 268, President Judge Keller stated for the Superior Court at page 281, "The distinction between one who commits a misdemeanor and one who causes or *procures* it to be done, is that the former includes the actual perpetrator and those present, aiding and assisting, and the latter embraces those who counsel, abet, cause or *procure* it to be done, but are neither the actual perpetrators nor present, aiding and assisting, at its commission." (Emphasis added). In Campbell v. Com., 84 Pa. 187 the court held that the defendant, who was not present at the murder but was an accessory before the fact, could be convicted of murder if the jury found that he procured the murder. To the same effect, see Com. v. Strantz, 328 Pa. 33, 42.

The defendant claims that the record does not support a verdict of guilty of the charge of being an accessory before the fact since he was nothing more than a messenger. It

is conceded that if the defendant had merely given or sold Mrs. Ressler information as to where she could have an abortion performed, he would not be guilty of being an accessory. But the defendant's activities went far beyond the passing of information. He was an integral part of a chain of events which ended in an abortion being performed on the victim. He set up an appointment with the abortionist to abort Mrs. Ressler and instructed the victim where to go and when, and how to identify herself when she arrived. Without the defendant's help and assistance in arranging for the abortion to be performed, Mrs. Ressler would not have arrived at the home of Helen Harris and no offense would have been committed. The defendant even received one-half the cost of the abortion, making him an equal partner with the actual abortionist. All of this was denied by the defendant but apparently the jury accepted the Commonwealth's evidence as true by returning a verdict of guilty.

In connection with the defendant's motion for a new trial, we have already discussed the use of the word "procure" by the court in its charge, to which objection was taken. Only a general exception was taken to the balance of the charge and unless it contained fundamental error, no advantage accrues to the defendant: Zeman v. Cannonsburg, 423 Pa. 450. This leaves only the question of the admissibility of the testimony of Melody McFarland and the refusal of the court to strike her testimony from the record.

The motion to strike the testimony of Melody McFarland came at the close of her testimony but before the close of the Commonwealth's case and the sustaining of the defendant's demurrer to the conspiracy charge involving Melody. A motion to strike her testimony after the successful demurrer undoubtedly would have been granted and the defendant would then have had no complaint.

Objection was made by defendant's counsel to the court's instruction to Melody, the victim in a charge of conspiracy to commit abortion and one who had not been charged with any criminal offense, to testify after she had

claimed her right to remain silent on the ground that anything she might say would tend to incriminate her. No objection was made that the testimony of Melody was immaterial or irrelevant to the conspiracy indictment being tried. The only real objection made to Melody's testimony was the she did not say enough to make out a case of conspiracy and the court agreed with this contention and sustained the demurrer.

In its charge, the court instructed the jury that the case against the defendant involving Melody McFarland had been dismissed by the court for the reason that there was no proof of a combination or agreement between the defendant and Helen Harris sufficient to support the charge. The jury was told not to consider the case involving Melody, and no comment was made about her testimony by the court. We believe that this instruction effectively took away from the jury any consideration of the testimony given by Melody.

The defendant contends that the admission of Melody's testimony was improper because it was coerced from her by the court under an improper grant of immunity. Assuming for argument sake only that Melody's constitutional right was violated and that the court's grant of immunity was without authority, how does this adversely effect the defendant? The privilege of claiming immunity from testifying did not rest in the defendant since the privilege is a personal one and can only be claimed by the person involved: Com. v. DeMasi, 234 Pa. 570; Com. v. Spallone, 154 Pa. Superior Ct. 282; Rogers v. United States, 340 U. S. 367. If anyone has been hurt, it is Melody and she is not here complaining. What she testified to at the trial was relevant and material to the charge against the defendant and he has made no objection to her testimony as such, except that Melody's rights were violated. The defendant elicited information from Melody on cross-examination and it was this information which was responsible for the sustaining of the defendant's demurrer to the charge involving Melody.

The defendant argues that Melody's testimony was illegal in the same sense as the evidence used to convict in Mapp v. Ohio, 367 U. S. 643 and that he was denied due process of law. This high sounding argument loses sight of the material and differentiating fact that it was not the defendant's right which was violated but Melody McFarland's, assuming her rights were violated. What happens to Melody now that she has testified or what might have happened if she had refused to testify is no concern of the defendant's since only Melody could claim her right to remain silent and only Melody stands to suffer by reason of her testimony.

We have read and reread Snyder Appeal, 398 Pa. 237 and are not convinced that the case rules the present situation. In the first place Melody McFarland, at the time of this trial, nor since, was not charged nor threatened to be charged with any criminal offense. In the second place she, being a victim, could not be guilty of abortion or conspiracy to commit abortion: Snyder Appeal, supra, page 246. It is argued that Melody testified she was pregnant and must, therefore, have had sexual intercourse and, being unmarried, could be prosecuted for fornication. When and where Melody may have committed fornication certainly was immaterial to the charge of conspiracy against the defendant and would have been excluded from the record if any attempt had been made to elicit such information. Without any information as to when or where Melody engaged in the act of fornication, no one would be in a position to prosecute her. As a matter of fact, Melody testified to no more than that she was pregnant, which in itself is no criminal offense. Her testimony did not in fact incriminate her and her fear of incrimination was groundless.

In Snyder Appeal, supra, at page 241, the Supreme Court stated, "A witness placed in the situation of responding to questions which can possibly incriminate him must be allowed some latitude in determining whether he should or should not answer." We do not understand this to

mean that the witness is the sole arbiter of whether or not he should testify: Com. v. Bell, 145 Pa. 374, 388. If there is no basis in fact, such as in the present case, that testimony will tend to incriminate her, then the witness has no right to refuse to testify.

We are led to the conclusion that the defendant was not hurt by Melody's testimony, nor was she, and that the court's direction to Melody to testify under the circumstances existing does not form the basis for granting the defendant a new trial. We are further of the opinion that no fundamental error was committed by the court in granting Melody McFarland immunity from prosecution under the circumstances existing: Com. v. Bell, supra.

AND NOW, March 31, 1967, the defendant's motions in arrest of judgment and for a new trial are dismissed and the defendant is directed to appear for sentence at the call of the District Attorney.

By the Court:

W. G. JOHNSTONE, JR.

OPINION

IN THE COURT OF QUARTER SESSIONS OF LANCASTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

HARRY S. BERBERIAN

March Sessions, 1966, No. 66 Accessory before the fact

March Sessions, 1966, No. 64 Conspiracy

Motions in Arrest of Judgment and for a New Trial

OPINION SUR RE-ARGUMENT

JOHNSTONE, J.

Re-argument in this case was granted on the defendant's motion based on the allegation that the opinion in Commonwealth v. Carrera, 424 Pa. 551 controlled the present case. Our original opinion was handed down on March 31, 1967, after the Carrera decision on March 14, 1967 but before the case was reported in the Advance Reports of April 28, 1967.

The Carrera case, as we understand it, establishes two principles: first, that an unmarried abortion victim may refuse to testify on her apprehension of the danger of prosecution for fornication, and second, that a district attorney has no authority to grant a witness immunity from criminal prosecution. It follows that Melody McFarland in the present case was justified in claiming her privilege against self-incrimination and that she could not have been held in contempt for refusing to testify. However, no attempt was made by the district attorney to grant immunity, this was done by the trial judge and specifically covered the offense of fornication.

Melody McFarland, the only person for whom the constitutional safeguard was intended, has not been hurt up to this time by testifying and the Court effectively removed the remote possibility of her ever being hurt. Commonwealth v. Bell, 145 Pa. 374, 391. There is no statutory or constitutional authority providing for the grant of immunity to witnesses from criminal prosecution by the Court, nor is there any inhibition against such grant of immunity. In Erie City's Appeal, 297 Pa. 260, the Supreme Court stated at page 270, "The law is a practical science, and, in the absence of statutory inhibition, our Courts may take such steps, regarding matters properly before them, as will promote the administration of justice." Although the Commonwealth did not make out a case of conspiracy against the defendant in the indictment involving Melody McFarland, at the time she was called to testify, the ends of justice demanded that she be granted immunity and required to testify.

However, if it should be decided on appeal that the grant of immunity was improper and ineffectual so far as Melody McFarland was concerned, the testimony she gave was relevant to the issue involved and not illegal in the sense claimed by the defendant. Furthermore, a demurrer to the evidence in the case involving Melody McFarland was sustained and her testimony was not used against the defendant in the companion case being tried at the same time and in which the defendant was found guilty.

The jury was told in the trial judge's charge, "I am skipping over the testimony of Melody McFarland, since the charge of conspiracy as to her has been dismissed by the Court. This is also a charge of conspiracy and at the close of the testimony, the Defendant demurred to that testimony, which says in effect, accepting as true everything the Commonwealth has said, they haven't said enough to make out a case. The Court has agreed with them. There is no definite proof here there was any combination or

agreement between the Defendant and Helen Harris concerning Melody McFarland, therefore that case is dismissed and you will not consider it." At no other place in the charge was Melody McFarland mentioned except that a Philadelphia Policewoman testified Melody was in the home of Helen Harris when the police raided it.

The defendant claims that the Court by inference referred to the testimony of Melody McFarland in its charge. This claim is not substantiated by the record. At page 149 of the notes of testimony the Court stated, "We have the testimony of Policewoman Martin who tells us that she followed Melody McFarland on the train from Coatesville to Philadelphia, then in a cab to the 200 block of Upsal Street and then to 369 East Upsal Street, the home of Helen Harris. You will note the uniformity in approaching the home of Helen Harris. Elaine Ressler later testified that she followed this same route that Melody followed getting off in the 200 block then walking to the home of Helen Harris. Was this by chance that they both did this or was this by design, by instruction?"

The record is clear beyond question that Officer Theresa Martin testified to the same approach to the home of Helen Harris by Melody McFarland as did Elaine Ressler when testifying concerning her approach to Helen Harris's home. The Court was unquestionably referring to the testimony of Officer Martin and Elaine Ressler and not to anything stated by Melody McFarland.

The second alleged inference by the Court to the testimony of Melody McFarland is in the following statement at page 151, "Remember, that the girls, at least Elaine Ressler, when she called on the telephone, said that this is tonsils, according to instructions which she said she received from Doctor Berberian." The testimony of Policewoman Martin was to the effect that Melody made no telephone call before taking a cab to the Harris home. This was in conflict to Melody's testimony but no comment was made by the Court to any telephone call by Melody nor to

any conflict in the testimony of witnesses Martin and McFarland.

The third alleged inference by the Court in its charge to the testimony of Melody McFarland appears at page 157 where the Court said, "There are at least two witnesses here who said, that the price of the abortion was $400.00; $200.00 to the Defendant and $200.00 to Helen Harris." The Court's statement is correct and two of the witnesses who gave that testimony were Elaine Ressler and her sister, Arlene Scheetz (N.T. 99). No reference to Melody McFarland was made or intended.

Any and all testimony given by Melody McFarland was effectively removed from consideration by the jury in the Court's charge and the Court did not directly or by inference submit any of Melody's testimony for consideration by the jury in their disposition of the indictment involving Elaine Ressler. The consolidation of the Ressler and McFarland cases for trial was proper and was done without objection on the part of the defendant. Commonwealth v. Patrick, 416 Pa. 437. The indictment involving Melody McFarland was disposed of by the Court on the defendant's demurrer and the jury was told that the case was dismissed and they were not to consider it. The defendant received from the Court every safeguard to which he was entitled with respect to the testimony forced from Melody McFarland. No fundamental error in the Court's charge has been called to our attention, which is the only benefit to be derived by the defendant from a general objection to the charge: Segriff v. Johnston, 402 Pa. 109.

The fact that the defendant's motion to strike the testimony of Melody McFarland from the record was denied at the time the motion was made caused no harm to the defendant. When the Court told the jury in its charge to ignore the case involving Melody, the effect so far as the defendant was concerned was just as good, if not better than the granting of the motion during the course of the trial. The defendant was fairly tried and, in our opinion, the verdicts of the jury should stand.

AND NOW, August 11, 1967, the defendant's motions for a new trial and in arrest of judgment are again dismissed and the defendant is again directed to appear for sentence at the call of the District Attorney.

By the Court:

W. G. JOHNSTONE, JR.